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June 4, 2019

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

Re: *Application for Review by XO Communications Services, LLC of Decision of the Wireline Competition Bureau*, CC Docket Nos. 96-45 and 97-21, WC Docket No. 06-122

Dear Ms. Dortch:

On May 1, 2017, XO Communications Services, LLC ("XOCS") filed a request[1] that the Federal Communications Commission ("FCC" or "Commission") review an order of the Wireline Competition Bureau ("Bureau") addressing audit findings by the Universal Service Administrative Company ("USAC") concerning the appropriate jurisdictional classification of revenues associated with private lines.[2] As XOCS explained in its Application for Review

1 *XO Communications Services, LLC Application for Review Of Decision Of The Wireline Competition Bureau*, CC Docket Nos. 96-45, 97-21, WC Docket No. 06-122 (May 1, 2017) ("*Application for Review*"). After the initial appeal was filed in 2010, XOCS converted its corporate form to a limited liability company ("LLC"). In 2017, Verizon Communications, Inc. acquired the fiber-optic network business of XO Communications, including XOCS. XOCS is now a subsidiary of Verizon Communications.

2 *In the Matter of XO Communications Services, Inc., Request for Review of Decision of the Universal Service Administrator et al.*, CC Docket Nos. 96-45, 97-21, WC Docket No. 06-122, Order, 32 FCC Rcd 2140 (rel. March 30, 3017) ("*Private Line Order*").

("AFR"), the Bureau order should be reversed because the order essentially requires XOCS to prove that a circuit is not interstate, contrary to Commission precedent, and because the Bureau creates new evidentiary standards that it appears to apply retroactively.[3]

The XOCS AFR has now been pending for over two years. In an effort to move its request forward, XOCS submits this letter to provide the Commission with additional information in support of the AFR. If the Commission does not overturn the *Private Line Order*, it should follow its precedent in *InterCall* or *Anda* and order that the new evidentiary standards created in the *Private Line Order* be applied only prospectively, to services provided on or after the date of the order. This letter explains how those precedents guide that outcome.

The Commission Has Authority to Consider Industry Confusion in Determining How to Apply its Rules

In both *InterCall* and *Anda,* the Commission faced a situation where the application of the Commission's rules was unclear due at least in part to the Commission's own actions. In both cases, the Commission fashioned a remedy that took this confusion into account.

In *InterCall*, the Commission applied prospectively a rule clarification concerning the application of universal service fund ("USF") contributions to audio bridging services. The Commission had previously issued guidance indicating that carriers are required to make direct USF contributions based on revenues from "teleconferencing services."[4] At issue in *InterCall* was whether stand-alone providers of audio bridging, like InterCall, were providing "teleconferencing services" or whether that term only referenced services that were provided by integrated telecommunications carriers offering both the transmission and the bridging services over their own facilities.[5] Following an audit, USAC determined that stand-alone bridging services were equivalent, and in addition to requiring forward-going contributions, it required

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3 *Application for Review* at 2-3.

4 *Request for Review by InterCall, Inc. of Decision of Universal Service Administrator*, CC Docket No. 96-45, Order, 23 FCC Rcd 10731, 10731, 10732 (2008) ("*InterCall Order*").

5 *Id.* at 10731.

InterCall to submit revenue reports to calculate past contributions.[6] InterCall filed a request for review with the Commission.[7]

While the Commission ultimately agreed with USAC on the classification question, it concluded that it was unclear to the industry that stand-alone audio bridging services had a direct USF contribution obligation.[8] It said, further, that the Commission was partly to blame because it had "engaged in enforcement investigations without issuing concrete findings on the USF contribution obligation of similarly-situated conference calling providers, and issued orders that assumed as fact the terms of underlying carriers' tariffs regarding the end user status of stand-alone audio bridging providers."[9] Thus, the Commission found that "requiring direct contributions on a going-forward basis will best serve the interests of all parties to this proceeding."[10]

In *Anda*, the Commission granted a retroactive waiver of a rule because companies were reasonably uncertain about its applicability prior to the Commission's clarification decision. In 2006, the Commission issued an order pursuant to the Telephone Consumer Protection Act ("TCPA") requiring that opt-out notices be included on fax advertisements even when consumers had given prior express consent.[11] In 2010, Anda sought a declaratory ruling from the Consumer and Governmental Affairs Bureau that the Commission

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6 *Id.* at 10733.

7 *Id.* InterCall argued that audio bridging services are information services, and thus not required to make contributions, or that even if they are telecommunications services, they qualify as "other providers of telecommunications," which are only required to make direct contributions upon a showing from the Commission that it is in the public interest. *Id.*

8 *Id.* at 10731.

9 *Id.* at 10738.

10 *Id.* at 10738-39.

11 *Application for Review filed by Anda, Inc.; Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission*, CG Docket Nos. 02-278 and 05-338, Order, 29 FCC Rcd 13998, 14000 (2014) ("*Anda Order*").

lacked authority to issue such a rule, or alternatively, that it could not do so under the chosen provision of the TCPA, which allowed for private rights of action.[12] The Bureau dismissed the request on procedural grounds, but in *dicta* found that the Commission's rule was consistent with the statute.[13] Anda filed an application for review with the Commission, which affirmed the Bureau.[14]

However, the Commission found that good cause existed to grant retroactive waivers of the rule.[15] It concluded that retroactive waivers were justified because a footnote in the Commission's 2006 order promulgating the rule caused confusion as to the applicability of the rule to faxes sent to consumers who gave prior express consent.[16] Additionally, the Commission determined that granting a retroactive waiver would serve the public interest because confusion about the applicability of the rule could subject companies to substantial damages and other liability.[17]

Both *InterCall* and *Anda* are predicated upon a finding that there was significant confusion within the industry as to the application of Commission rules; confusion that the Commission had a hand in creating. They stand for the proposition that, where such confusion exists, the Commission has authority to craft a remedy that achieves fairness in the application of the Commission's rule. In *InterCall*, the Commission found that it could apply its declaratory

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12 *Id.* at 14001.

13 *Id.*

14 *Id.* at 13999.

15 *Id.* at 14008.

16 *Id.* at 14009. The Commission also found that while the rule was a logical outgrowth of the notice of proposed rulemaking, the notice did not explicitly state that the Commission was contemplating applying the rule to fax advertisements where consumers had given their prior explicit consent, which may have contributed to the confusion. *Id.* at 14009-10.

17 *Id.* at 14010-11. Ultimately, on review, the D.C. Circuit found that the Commission lacked authority under the TCPA to promulgate a rule that applied to faxes made with consent, and it reversed the FCC on that ground. *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078 (D.C. Cir. 2017). The court dismissed appeals of the FCC's waiver as moot. *Id.* at n.2.

ruling prospectively, while in *Anda*, the Commission found that this confusion created "good cause" for a waiver of the rule to prior actions. Regardless of which procedural route is used, the authority of the Commission to act is clear.

Confusion Regarding Application of the Private Line Rules Justifies Prospective Treatment Here

The expectations created by the Commission in the instant case are even more reasonably held by the industry than those that prompted prospective application in *InterCall* and *Anda*. Beginning in 1989, Commission actions and Commission statements fostered a belief that customer certifications played the central role in applying the FCC's Ten Percent Rule to subscriber lines. These actions were so widespread, and persisted over such a long period, that the industry reasonably believed that the presence or absence of a customer certification as to interstate use was dispositive of the classification of the subscriber line. Like the Commission actions that justified prospective application in *InterCall* and *Anda*, these FCC orders directly contributed to the industry's reasonable belief regarding the role of customer certifications. Although the Bureau rejected the industry's interpretation in the *Private Line Order* (wrongly, we believe), and concluded that the actual traffic carried was dispositive regardless of whether a certification was obtained, this history cannot be ignored. The Commission's participation in creating the belief regarding the role of customer certifications requires – if the Commission does not reject the Bureau's *Private Line Order* as incorrect – the Commission to apply the ruling only to services provided after the *Private Line Order*.

When the Commission adopted the Ten Percent Rule in 1989, it adopted a recommendation of the Federal-State Joint Board on Universal Service ("Joint Board") that so-called "mixed use" private lines be allocated to the intrastate jurisdiction unless there is a showing "through customer certification that each special access line carries more than a *de minimis* amount of interstate traffic."[18] The Joint Board recommendation also provided that customer certification is not needed for private lines when the A to Z end points of the circuit are

[18] *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, 4 FCC Rcd 1352, 1357, ¶32 (1989) ("*Recommended Decision*").; *see also MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72 and 80-286, Decision and Order, 4 FCC Rcd 5660, 5660 (1989).

both within the same state and the circuit is configured by the carrier to be a closed network.[19] The Joint Board selected the customer certification method to promote administrative simplicity and economic efficiency[20] and stated that the benefits of this "uniform, nationwide verification system" could be lost if carriers were required to look beyond the presence or absence of a certification.[21] Thus, when the Commission adopted the Joint Board's recommendation, it appeared to adopt the Joint Board's reliance on administrative simplicity, as applied through the use of customer certifications, as well.

Further, in later orders, the Commission again created the perception that certifications (or the lack of certifications) would be determinative. Specifically, in these later orders, the Commission made several references to the presence of customer certifications as the proxy for determining whether mixed-use lines are interstate under the Ten Percent Rule. In a 1995 order, the Commission summarized its rule, stating that "a subscriber line is deemed to be interstate *if the customer certifies* that ten percent or more of the calling on that line is interstate."[22] The clear implication of this statement was that a subscriber line could not be interstate without the customer certification. In other words, it was expected that the customer would certify the private line if it carried at least ten percent interstate traffic, but if it did not, no certification would be collected.

Then, in a 1998 order, the Commission relied in part on the Ten Percent Rule to classify the DSL services of GTE as interstate. The Commission reached the conclusion that DSL services (a predecessor to today's Broadband Internet Access Services) were interstate in part because GTE configured its lines to carry more than a *de minimis* share of interstate traffic and said that it would "ask every ADSL customer to certify that ten percent or more of its traffic

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19 *See Recommended Decision* at 1357, n.137 (noting that the need for a customer certification can be "based on information concerning system configuration and the nature of [the customer's] communication needs").

20 *Id.* at 1358, ¶ 35.

21 *Id.* at 1357, ¶ 32.

22 *Petition for an Expedited Declaratory Ruling filed by National Association for Information Services, Audio Communications, Inc., and Ryder Communications, Inc.*, 10 FCC Rcd 4153, 4161, ¶17 (1995) (emphasis added).

is interstate."[23] Here again, the Commission's actions did not appear to allow a line to be classified as interstate unless a certification was obtained.

Finally, in 2001, when the Commission reaffirmed the continued use of the Ten Percent Rule for Part 36 jurisdictional separations, it stated that "mixed-use lines would be treated as interstate *if the customer certifies* that more than ten percent of the traffic on those lines consists of interstate calls."[24] Once again, the summary of the rules provided by the Commission appears to contemplate certifications when the line is interstate but no certification if the line is intrastate.

The Commission's consistent and repeated treatment of private lines and customer certifications under the Ten Percent Rule created a widespread and reasonable understanding within the industry that carriers need only obtain customer certifications when more than ten percent of traffic on their private lines are interstate. XOCS believes that a substantial majority of the industry interpreted the Commission statements this way, and that most carriers only collected customer certifications if the private line was to be classified as interstate. The extent of this belief is evident from the fact that five other carriers – in addition to XOCS – had appealed similar USAC findings that each carrier failed to provide customer certifications or other affirmative evidence that their wholly intrastate private lines did not carry more than a *de minimis* amount of interstate traffic.[25] All of the carriers that commented on the appeals expressed a similar understanding. Further, in USAC audits completed *after* the Bureau

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23 *GTE Telephone Operating Cos., GTOC Transmittal No. 1148*, 13 FCC Rcd 22466, 22481, n. 95 (1998).

24 *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, 16 FCC Rcd 11167, ¶ 2 (2001) (emphasis added).

25 *Request for Review by McLeodUSA Telecommunications Services, Inc. of Universal Service Administrator Decision*, CC Docket Nos. 96-45 and 97-21 (filed Oct. 1, 2007); *Request for Review of PaeTec Communications, Inc. of Universal Service Administrator Decision*, WC Docket No. 06-122 (filed April 3, 2012); *Request for Review by Puerto Rico Telephone Company, Inc. of Decision of the Universal Service Administrator*, WC Docket Nos. 08-71 and 06-122, CC Docket Nos. 97-21 and 96-45 (filed June 25, 2012); *Request for Review by US Link, Inc. of Universal Service Administrator Decision*, WC Docket No. 06-122 (filed Sept. 30, 2013); *Request for Review by Deltacom, Inc. of Universal Service Administrator Decision*, WC Docket No. 06-122 (filed Sept. 30, 2013).

order but concerning revenues received prior to the order, USAC continues to issue Ten Percent Rule "findings" on a regular basis. For example, in the January 2018 business update to the Audit Committee of the Board, USAC reported that private line jurisdictional findings in audits completed in FY 2016 had increased 8% from prior years' audits.[26] As a result, even after the *Private Line Order* the Commission has received appeals relating to classification decisions made prior to the Bureau's order.[27]

XOCS submits that, if the Commission does not reverse the Bureau's *Private Line Order*, it should nevertheless apply the Bureau's ruling only to services provided after the date of the *Private Line Order*. The above discussion demonstrates that there was a widespread industry understanding of the Ten Percent Rule that gave a predominant role to the existence or absence of a customer certification in determining the jurisdiction of a private line. This industry understanding, moreover, was fueled by persistent Commission statements (issued over decades) to the extent that a subscriber line could be classified as interstate only if a customer certification was obtained. This understanding, like the analogous understandings regarding stand-alone audio bridging and solicited faxes, was justified by these Commission actions, and to apply a contrary rule would impose a manifest injustice.

For example, it would impose a manifest injustice on XOCS if the *Private Line Order* were applied to XOCS's classification decisions made in the audit under question. XOCS acted consistent with the widespread industry understanding of customer certifications when, in 2007, it assessed the jurisdiction of its private line services for purposes of the USF reporting requirements. XOCS did not simply presume, without a good-faith inquiry and blinded to evidence of the contrary, that all its private lines were intrastate, as the *Private Line Order* posits would be possible in the absence of a customer certification.[28] Rather, in instances where XOCS knew that a circuit was connected to the Internet, it allocated the circuit as interstate. When it knew or suspected that there was more than a *de minimis* amount of interstate traffic on the network, XOCS obtained customer certifications, which it submitted to USAC. It was only for a subset of its private lines, designed to be closed networks and with physically intrastate

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[26] Audit Committee, *Briefing Book*, USAC (Jan. 29, 2018), https://www.usac.org/_res/documents/about/pdf/bod/materials/2018/2018-01-29-ac-briefing-book.pdf.

[27] *See, e.g.*, Altice USA, Inc., Request for Review of Decision of the Universal Service Administrator, WC Docket No. 06-122 (filed February 2, 2018).

[28] *Private Line Order* at 2145, ¶ 11.

endpoints, where XOCS classified those lines as intrastate because there was no customer certification to the contrary (and no reason to believe that such a certification would be justifiable). XOCS's assessment was in good faith and was consistent with the Commission's statements to date in 2007, and its determination that these lines were wholly intrastate was to the best of its knowledge and belief.

Applying the *Private Line Order* retroactively would require XOCS to obtain detailed information for services it provided a dozen years ago, in 2007. Given that neither USAC, the Bureau, nor the Commission had articulated these standards before the *Private Line Order*, XOCS could not have reasonably expected at that time that it would need to collect and maintain evidence beyond customer certifications for interstate lines that it would need to later provide to prove certain private lines are wholly intrastate. Further, it is not now feasible for XOCS to identify the specific customers and to obtain either certifications as to the nature of their traffic on the circuits or to develop other information that would be consistent with the *Private Line Order*. As XOCS noted in its AFR, some of its customers may no longer exist, and many of XOCS's employees that could have been helpful to obtaining some of this information are no longer with the company.[29] XOCS simply has no reasonable way, after the *Private Line Order*, to present the kind of information that the Order specifies, concerning services XOCS provided in 2007. To even ask XOCS to develop evidence a dozen years after the services were provided demonstrates the futility of such an endeavor. Therefore, declining to apply these new standards retrospectively is the best course of action.

It is in the public interest to apply new standards only prospectively, if at all. In *InterCall*, the Commission found that prospective application of its rule clarification would "best serve the interests of all parties to th[e] proceeding."[30] And when the Commission granted a retroactive waiver in *Anda*, it determined that doing so would serve the public interest because retroactive application could subject companies to substantial damages and other liability.[31] In the present case, the Commission had established a reasonably clear rule buttressed by clarifications in other orders and a lack of contradictory enforcement actions. This created a widespread understanding within the industry about the requirements of the rule, which XOCS followed. XOCS has made clear that it cannot reasonably obtain or provide the information needed to meet the new evidentiary standard for services provided a dozen years ago. There is a

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29 *Id.* at 17.

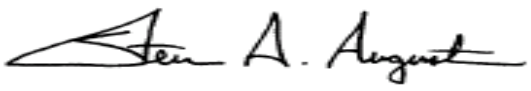
30 *InterCall Order* at 10738-39.

31 *Anda Order* at 14010-11.

risk that XOCS will be substantially harmed by its inability to meet the new standard, if it is required to pay retroactive USF fees on its 2007 revenues. Declining to apply the new standards retroactively, by contrast, would still preserve any benefits of the new guidance going forward. Therefore, applying the new evidentiary standards in the *Private Line Order* prospectively is in the public interest.

For the foregoing reasons, if the Commission does not overturn the *Private Line Order*, it should order that the new standards within the order apply only prospectively. As *InterCall* and *Anda* demonstrate, it is within the Commission's discretion to apply new interpretations of rules prospectively or issue retroactive waivers of rules. As in *InterCall*, the Commission could, in response to the XOCS AFR, conclude that the conclusion adopted in the *Private Line Order* applies only prospectively. Alternatively, the Commission already has before it one petition for retroactive waiver similar to that issued in *Anda*.[32] XOCS clearly asked for prospective treatment in its AFR, which the Commission has discretion to treat as a request for waiver.[33] Therefore, the Commission also could act through waiver and could apply its conclusion to similarly-situated entities.

Sincerely,



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Counsel to XO Communications Services, LLC

cc: Ryan Palmer
Karen Sprung

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32 *Application by TDS Metrocom, LLC for Review or Clarification, or in the Alternative, Request for Waiver*, CC Docket Nos. 96-45, 97-21, WC Docket No. 06-122 (filed May 1, 2017).

33 *See Anda Order* (where the Commission granted a waiver following Anda's application for review).